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No. _____

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In The
Supreme Court of the United States

DAVID PARNIGONI,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the District of Columbia's statutory prohibition on indecent exposure is void for vagueness so that Petitioner's prosecution and conviction thereunder deprived him of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution?

II. Whether the District of Columbia's statutory prohibition on indecent exposure is overly broad, prohibiting activities that are constitutionally permitted, such that Petitioner's prosecution and conviction thereunder deprived him of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution?

III. Whether the Court of Appeals for the District of Columbia deprived Petitioner of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by improperly curtailing his challenge to the statutory provision under which he was prosecuted?

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

The following were parties to the proceedings below, both in the Superior Court for the District of Columbia and in the District of Columbia Court of Appeals: Plaintiff District of Columbia; and Defendant David Parnigoni.

CORPORATE DISCLOSURE STATEMENT

No corporation was a party to the underlying actions in either the Superior Court for the District of Columbia, or in the District of Columbia Court of Appeals.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS

The opinions and orders of the Superior Court of the District of Columbia were unpublished. The opinion of the District of Columbia Court of Appeals in this matter was published as *Parnigoni v. District of Columbia*, 933 A.2d 823 (2007). The Order of the District of Columbia Court of Appeals denying Parnigoni's petition for rehearing *en banc* was unpublished.

STATEMENT OF JURISDICTION

On October 11, 2007, the District of Columbia Court of Appeals decided *Parnigoni v. District of Columbia*, No. 04-CT-1378 (App. 1). On June 23, 2008, the District of Columbia Court of Appeals denied a timely-filed Petition for Rehearing *en Banc* (App. 21). This Petition for a Writ of Certiorari is being filed within ninety days of that denial in accordance with 28 U.S.C. § 2101(d) and Sup. Ct. R. 13(1) and (3). Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) and (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth Amendment to the United States Constitution, which provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." It also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

This case also involves D.C. Code § 22-1312 (2001), which reads:

> (a) It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than $300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense.
>
> (b) Any person or persons who shall commit an offense described in subsection (a) of this section, knowing he or she or they are in the presence of a child under the age of 16 years, shall be punished by imprisonment of not more than 1 year, or fined in an amount not to exceed $1,000, or both, for each and every such offense.

STATEMENT OF THE CASE

Petitioner, David Parnigoni ("Parnigoni"), worked at Janney Elementary School in D.C., where he was a counselor and a teacher's aide. During his employment there, Parnigoni befriended a boy, O.J., who attended the school. Over the course of three or four years, Parnigoni also became close friends with O.J.'s family, including O.J.'s father, J.J., his mother and O.J.'s two younger sisters. Indeed, Parnigoni spent considerable time with the family over the years, and O.J.'s parents came to have great trust in him. They treated Parnigoni as a family member, giving him keys to their home and allowing him to come and go as though it were his own home. Indeed, the father testified at trial that he considered Parnigoni to be a family member.

At the time of the events in question, O.J. was eleven-years old. Parnigoni was thirty-three.

O.J. testified that he and Parnigoni drove to Pennsylvania on the day in question to buy fireworks. That afternoon, they returned to O.J.'s family residence. No one else was home when they arrived.

The two went down to the basement to play ping pong. Parnigoni suggested an additional rule for the game they were about to play: whoever lost had to play the next game naked. O.J. agreed. Parnigoni lost the first game, took off all his clothes, and the two began the next game with Parnigoni playing naked. O.J. testified that he was able to see Parnigoni's "private parts" during that game.

Partway through that second game, J.J., O.J.'s father, unexpectedly returned home. While he was still outside the home, J.J. could hear that there was a ping pong game taking place in the basement. He testified that he also heard "laughter and other joyful sounds" coming from the basement.

The father, J.J., entered the home and walked down the stairs into the basement. When he was almost to the bottom of the stairway, J.J. saw Parnigoni completely naked. When Parnigoni saw J.J. on the bottom of the stairway, Parnigoni was "startled" and "surprised," according to J.J.'s testimony. J.J. testified that Parnigoni immediately covered his genitals and ran into a nearby bathroom. J.J. never testified that he saw Parnigoni's genitals. Rather, he testified that he "could see [Parnigoni's] buttocks."

J.J. asked his son whether he was "okay," and then asked him to go to his room. O.J. never testified that he was upset, offended, shocked, concerned or surprised by the defendant being naked. From his testimony, one could infer that O.J. had no adverse reaction to the defendant's nakedness but, rather, simply considered it part of the game. As noted above, O.J.'s father testified that, as he stood outside the home, he heard "laughter and other joyful sounds" emanating from the basement.

Parnigoni was charged in a criminal Information with two counts of indecent exposure. One count charged him with indecent exposure to O.J., in violation of D.C. Code § 1312(b); and the

other with indecent exposure to J.J., the father, in violation of D.C. Code § 1312(a). The matter was tried to a jury.

At the end of the government's case-in-chief, Parnigoni moved for a judgment of acquittal. (App. 23) He argued that in order to make out the charged offense of "obscene and indecent" exposure, the government had to prove more than simply exposure of one's genitalia to another person. (*Id.* at 24 - 30) Parnigoni pointed out that if this were the only requirement of the offense, other conduct, commonly accepted and not criminal, such as being naked in a locker room, would be criminal, and under such an interpretation, the statute would violate constitutional principles of vagueness and overbreadth. The Court denied the defendant's motion. (*Id.* at 32 - 33)

Parnigoni adduced no evidence at trial, and the jury convicted him of both counts. He subsequently appealed his convictions, arguing that the statute was unconstitutionally vague and overly broad; and also that there were insufficient facts upon which to convict him with regard to any exposure to J.J., the father. *Parnigoni v. District of Columbia*, 933 A.2d 823 (2007) (App. 1 – 20). The D.C. Court of Appeals rejected Parnigoni's arguments and affirmed his convictions. *Id.*

ARGUMENT

"Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). A statute is void for vagueness both where it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute, and where it encourages arbitrary and erratic arrests and convictions. *Id.* (citations omitted). "[W]here a statute imposes criminal penalties, the [requisite] standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (citing *Winters v. New York*, 333 U.S. 507, 515 (1948)).

Here, Mr. Parnigoni was deprived of his right to fair warning concerning what acts were criminalized by D.C.'s indecent exposure statute, D.C. Code § 22-1312. Even prior to the Court of Appeals' decision in this case, that court recognized that one had to examine the "judicial gloss" applied to the indecent exposure statute to discern what it prohibited. In this case, the D.C. Court of Appeals radically and unforeseeably expanded the reach of the indecent exposure statute on the issues of consent and of whether the statute applied to exposures occurring in the privacy of the home to a consenting person. Even before its decision here, the statute – viewed in light of the "judicial gloss" – was unconstitutionally vague and overly broad. In its decision below, however, the Court of Appeals greatly exacerbated those problems and, by grafting

onto the indecent exposure statute a consent element that has no application to the crime of indecent exposure, turned D.C.'s indecent exposure statute into a strict liability crime where a person under the age of sixteen sees another's genitals.

For the reasons discussed herein, D.C.'s indecent exposure statute is both void-for-vagueness and overly broad. Parnigoni was, therefore, deprived of his right to due process. Moreover, the D.C. Court of Appeals further deprived Parnigoni of his due process rights by improperly curtailing the parameters of his challenge to the indecent exposure statute, in contravention of its own precedent. His convictions must, therefore, be reversed, and the Court should grant him a writ of certiorari to review the decisions below.

I. THE INDECENT EXPOSURE STATUTE UNDER WHICH MR. PARNIGONI WAS CHARGED AND CONVICTED IS UNCONSTITUTIONALLY VAGUE AND IS, THEREFORE, VOID.

Parnigoni was charged and convicted under D.C. Code § 22-1312(a) and (b) (2001), which makes criminal the "indecent exposure of [one's] person." What constitutes "indecent exposure," however, is not statutorily defined. As conceded by the D.C. Court of Appeals, one must turn to "judicial gloss" to discern what § 22-1312 seeks to criminalize. *Parnigoni v. District of Columbia*, 933 A.2d at 826 ("[T]he indecent exposure statute addressed here has had a number of judicial glosses that have clarified

its meaning, at least in the context of the facts of this case").

Even with that "judicial gloss," however, the statute is unconstitutionally vague because it gives no fair warning concerning its application to acts occurring inside the family home with a consenting person, as happened here; or to other common settings in which one's genitalia is exposed to others, such as in the typical locker room shower, or in men's restrooms, where urinals are often found side-by-side with no dividers between them.[1]

As noted above, "[l]iving under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.'" *Papachristou*, 405 U.S. at 162 (quoting *Lanzetta*, 306 U.S. at 453). A statute is void for vagueness both where it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute, and where it encourages arbitrary and erratic arrests and convictions. *Id.* (citations omitted). "The *sine qua non* of constitutional certainty in the definition of crime is fair warning of the statutory prohibitions to those of ordinary intelligence – notice of the proscribed activities which is reasonable when gauged by common understanding and experience."

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[1] "Judicial gloss" must be referenced even to learn that by one's "person," the statute is referring to genitalia. *Id.* at 826 ("We addressed the meaning of this language in *Duvallon v. District of Columbia*, 515 A.2d 724 (D.C. 1986), and held that the language 'obscene or indecent exposure of his or her person' makes 'the indecent exposure of human genitalia [] the offense.' 515 A.2d at 728").

Ricks v. United States, 414 F.2d 1111, 1117 (D.C. Cir. 1968) (footnote omitted). A statute "must be sufficiently focused to forewarn of both its reach and coverage." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 33 (1963). These due process principles apply to States and their statutes. *Papachristou*, 405 U.S. at 165.

With regard to the facts of his case, Parnigoni argued below that the statute had no application to an act committed 1) in private and 2) in the presence of a singular, consenting person. The D.C. Court of Appeals agreed with Parnigoni on this point. "Parnigoni . . . asserts that the indecent exposure statute was not intended to apply to an act committed in private in the presence of a single and consenting person. This is an accurate statement of our law." *Id.* at 827 (citations omitted). The Court of Appeals held, however, that Parnigoni's "argument misses the point. O.J. cannot have consented because he was under the age of sixteen when the events at issue took place; *such consent is barred by statute*." *Id.* (emphasis added).

On this, the Court of Appeals was simply wrong and there is no way that a reasonable person, after thoroughly studying the indecent exposure statute or the "judicial glosses" put thereon, would have fair notice that that was the case. No District of Columbia case, prior to Parnigoni's, ever so held. No case, prior to his, applied the consent provisions of D.C.'s Anti-Sexual Abuse Act to the indecent exposure statute. Indeed, the consent provisions found in D.C.'s Anti-Sexual Abuse statutes (D.C. Code § 22-3011) are, on their face, limited to

enumerated offenses, and indecent exposure is not one of those enumerated offenses. Thus, a reasonable person would have no fair warning on the issue of consent, and the Court of Appeals' grafting of those provisions onto the indecent exposure statute violated Parnigoni's right to due process.

D.C.'s indecent exposure statute and its Anti-Sexual Abuse statutes are found in separate chapters of the D.C. Code. The indecent exposure statute is part of Chapter 13 of the D.C. Code; the sexual abuse statutes are part of Chapter 30.

Second, and more importantly, in ruling – for the first time – that "*such consent is barred by statute*," in the context of an indecent exposure charge, the D.C. Court of Appeals relied on D.C. Code § 22-3011, part of Chapter 30. *Parnigoni*, 933 A.2d at 828 ("Section 3011 [of the Anti-Sexual Abuse Act of 1994] provides that '[n]either mistake of age nor consent is a defense to a prosecution' under these sections, and section 22-3001 defines a child as 'a person who has not yet attained the age of 16 years,' *id.*").

No reasonable person would envision this grafting of the provisions of that consent statute from Chapter 30 into the indecent exposure statute of Chapter 13, however, because that consent statute, D.C. Code § 22-3011, by its own terms, is explicitly limited to violations, or attempted violations, of Chapter 30 offenses, specifically to "prosecution[s] under §§ 22-3008 to 22-3010.01 [prohibiting first- and second-degree child sexual abuse, enticing a child and misdemeanor child

sexual abuse], prosecuted alone or in conjunction with charges under § 22-3018 [attempts to commit sexual abuse offenses] or § 22-403 [assault with intent to commit any other offense]." D.C. Code § 22-3011(a).

The same holds true for the Court's reference to the statutory definition of a "child" in § 22-3001, *Parnigoni*, 933 A.2d at 828, because that provision is also limited to charges brought under Chapter 30 ("For the *purposes of this chapter* . . . (3) 'Child' means a person who has not yet attained the age of 16 years"). None of these provisions of Chapter 30, which are, by their own terms, limited to offenses defined in that Chapter, gives a person fair warning of what constitutes indecent exposure that is criminalized under Chapter 13 of the D.C. Code.

Therefore, the Court of Appeals was wrong in finding that a person would be fairly warned, on the issue of the consent of a person under the age of 16 with regard to the indecent exposure statute, by the provisions of D.C. Code § 22-3011(a). Prior to the Court of Appeals' decision in this case, no one could have foreseen the judicial expansion of the indecent exposure statute that occurred in this case. Thus, that unforeseeable expansion resulted in the deprivation of Parnigoni's right to due process and his convictions must be set aside.

The Court of Appeals was also wrong in finding that a person would have fair warning about whether the provisions of the indecent exposure statute apply to acts occurring inside the basement of a private home, to which Parnigoni had unfettered

access and that was owned by a family of which he was considered a part.

On this issue, the Court of Appeals turned, again, to "judicial gloss." The Court of Appeals framed the issue as "whether or not Parnigoni's conduct was sufficiently public as to be prohibited by the indecent exposure statute." *Parnigoni*, 933 A.2d at 829. In response, the Court of Appeals held:

> Our law extends to indecent exposure committed both in a public setting and a private one. *Rittenour v. District of Columbia, supra,* 163 A.2d at 559 (D.C. 1960) ("[I]n the present law, Congress deleted the requirement that [indecent exposure] be committed in public and, in fact, expressly indicated that the statute covered acts occurring anywhere in the District" (internal quotation marks omitted)). We hold that, given these facts, a reasonable person should have known his or her act would be open to the observation of others. Parnigoni, therefore, is not exempted from the statute because his actions were conducted within a private home because his conduct was sufficiently public to come within the statute.

Id.

However, *Rittenour*, upon which the Court of Appeals relied for this holding, actually buttresses Parnigoni's position and undercuts the conclusion reached by the Court of Appeals. This becomes clear by reading the sentence that immediately follows the

one quoted by the Court of Appeals above. What *Rittenour* actually says, beginning with that portion quoted by the Court of Appeals above, is the following:

> [I]n the present law, Congress deleted the requirement that [indecent exposure] be committed in public and, in fact, expressly indicated that the statute covered acts "occurring anywhere in the District"
>
> Although an open or public act in the common-law sense is no longer required, *it is our opinion that the present law was not designed to apply to an act committed in privacy in the presence of a single and consenting person.*

Rittenour, 163 A.2d at 559 (emphasis added; footnote omitted).[2]

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[2] That the Court of Appeals here misconstrued its holding in *Rittenour* by leaving out this portion of the *Rittenour* holding is also made clear by *Lutz v. United States*, 434 A.2d 442, 444 (D.C. 1981), where the D.C. Court of Appeals noted that

> In *Rittenour*, this court held that a related provision prohibiting "lewd, obscene, or indecent" acts (and proposals for such acts) . . . did not apply to homosexual *acts committed in private between consenting persons. See Rittenour, supra* at 559. The court did so *as a matter of statutory interpretation, even though Congress had amended this statute* as it had amended [another statute] *to remove the requirement of an act in public.* (Emphasis added.)

Contrary to the Court of Appeals' decision in this case, then, if Parnigoni – or any other reasonable person – had studied the "judicial gloss" that had been applied to the indecent exposure statute and, in so doing, read *Rittenour*, he would have been quite confident when, in taking off his clothes in front of O.J. in the basement of a private home with no one else present, he was in no way violating the statute. His confidence would have been bolstered had he continued to study later D.C. Court of Appeals opinions, such as *Duvallon v. District of Columbia*, 515 A.2d 724 (D.C. 1986). What Parnigoni would have read in *Duvallon* is the following:

> In *District of Columbia v. Garcia*, 335 A.2d 217 (D.C. 1975), [*cert. denied* 423 U.S. 894 (1975)], we held that the indecent exposure clause of § 22-1112(a) [the predecessor to current § 22-1312(a), at issue here] was a codification of the common law crime of indecent exposure and cited to 50 Am.Jur.2d *Lewdness, Indecency and Obscenity* §§ 17 – 18 (1970), and 67 C.J.S. *Obscenity* § 5 (1950). *Garcia, supra,* 335 A.2d 222 n.16. This construction is in accordance with principles long established by this court that "[i]n the absence of a statutory definition of the elements of a crime, the common law definition is controlling. . . .

> In American Jurisprudence, which *Garcia* cites, the common law crime of indecent exposure is defined as "the wilful and intentional exposure of the private parts of one's body *in a public place in the presence of an assembly* . . ." 50 Am.Jur.2d, *supra*, at § 17. Corpus Juris Secundum, which *Garcia* also cites, defines the offense as "the exhibition of those private parts of the person . . . The purpose of such laws is to *protect the public from shocking and embarrassing displays* of sexual activity . . ." 67 C.J.S. *Obscenity* § 10 at 49 – 50 (1978). Further, "[c]onviction of the offense requires proof [that one] . . . intended by his conduct to direct *public attention* to his genitals . . ." *Id.* at § 10 at 50.

Id. at 725 – 726 (emphasis added; some citations omitted).[3]

Had Parnigoni continued reading the *Duvallon* opinion, he would have learned that

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[3] The excerpt of *Duvallon* just quoted refers to "shocking and embarrassing displays." Parnigoni argued below that since there was no evidence that O.J. was shocked, offended or embarrassed by Parnigoni's nudity (indeed, his father testified that – from outside the house – he heard only "laughter and other joyful sounds"), this was another reason he could not be convicted under the indecent exposure statute. He pointed out that, in D.C., "[n]udity is not *per se* 'obscene.'" *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962) (cite omitted). The Court of Appeals rejected those arguments, as well. *Parnigoni*, 933 A.2d at 828 n.9.

> The common law of the District of Columbia consists of the common law of Maryland and the British statutes in force in Maryland in 1801, unless inconsistent with provisions of our codes. . . . The Maryland courts have held that "[t]he authorities . . . cited are in substantial accord that at the common law indecent exposure was the wilful and intentional exposure of the private parts of one's body *in a public place in the presence of an assembly.*" . . . *Dill v. State*, 24 Md. App. 695, 697, 332 A.2d 690, 693 (1975).

Id. at 726 (emphasis added; footnotes omitted).

Reading further, Parnigoni would have found that the dissent in *Duvallon* recognized that "reasonable minds may differ as to how our [indecent exposure] statute should be interpreted," but that even the dissent agreed that "[t]he underlying purpose of the prohibition against indecent exposure *is straightforward*: to *protect the public* from being confronted *in public places* by annoying, shocking, or embarrassing displays of nudity or sexual activity." *Id.* at 729 (Pryor, C.J., dissenting) (citing, *inter alia, Hearn*, 178 A.2d at 438).

Had Parnigoni, before the day in question, been extra careful and checked to see whether these pronouncements in *Duvallon* had been overruled or changed in any way over the years, he would have found no changes in its interpretation, and would also have found that the D.C. Court of Appeals' most recent reference to *Duvallon* was in the case of

Ulmer v. United States, 649 A.2d 295, 298 n.4 (D.C. 1994). There, he would have read,

> We find no merit in appellant's constitutional claim that he was deprived of fair warning that his conduct would constitute a robbery by stealthy seizure. Unlike *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Duvallon* [], upon which appellant relies, the robbery statute of the District of Columbia had been previously interpreted as expanding common law robbery . . .

As this discussion shows, if Parnigoni had undertaken a complete and thorough examination of the indecent exposure statute, and all "judicial gloss" placed thereon by the D.C. Court of Appeals, he would have had no fair warning that he was violating that statute when, in the privacy of the basement of a family home, owned by a family that considered him part of that family, he removed his clothes in the presence of one consenting person, O.J., while the two of them played ping pong. To hold otherwise, as the Court of Appeals did here for the first time, deprived Parnigoni of his right to fair warning.

The Court of Appeals' holding in his case was both unforeseeable, and a retroactive judicial expansion of the statutory language, as that language had been construed by the Court of Appeals. Thus, Parnigoni's due process rights were violated. As this Court has previously held, "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory

language but also from unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352.

The same holds true with regard to whatever exposure may have occurred to O.J.'s father, J.J., when he unexpectedly returned home and entered the basement where the ping pong game was underway. As J.J.'s testimony made clear, Parnigoni was "startled" and "surprised" by J.J.'s unannounced appearance, and immediately covered his genitals and ran into a nearby bathroom. Unlike the situation with O.J., any exposure to J.J. was accidental and a result of carelessness, *e.g.*, for not locking the door to the basement stairway before Parnigoni disrobed.[4] Prior to the Court of Appeals' decision here, such accidental exposures were held to fall outside the prohibitions of the indecent exposure statute. *Selph v. District of Columbia*, 188 A.2d 344, 345 (D.C. 1963). As the court held in *Selph*,

> Before a conviction for indecent exposure can be upheld, it must be shown that the exposure was intentional, not accidental. Ordinary acts involving exposure as a result of carelessness or thoughtlessness, *particularly when such*

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[4] Moreover, as noted above, J.J. never even testified that he saw Parnigoni's genitals. Rather, the only portion of Parnigoni's body to which J.J. testified he saw was Parnigoni's buttocks. Therefore, Parnigoni argued below that there was insufficient evidence to sustain his conviction with regard to any exposure to J.J. The Court of Appeals rejected this argument. *Parnigoni*, 933 A.2d at 828, 829-830.

> *acts take place within the privacy of one's home*, do not in themselves establish the offense of indecent exposure.

Id. (emphasis added; footnotes omitted).

With regard to any exposure to the father, J.J., then, Parnigoni had no fair warning that any such unintentional, accidental exposure could be criminalized. Moreover, although this was not technically Parnigoni's home, it was his home in a practical sense. He had been given keys to the home; was allowed to come and go as he saw fit; spent much time there; and was viewed by the family, according to J.J., the father, as a member of the family.

For all of these reasons, Parnigoni lacked the requisite fair warning that his conduct could fall within the prohibitions of the indecent exposure statute, both with regard to his intentional exposure to O.J.; and with regard to his accidental exposure to J.J. when J.J. unexpectedly returned home and entered the basement unannounced. The D.C. Court of Appeals recognized that one cannot know the parameters of the indecent exposure statute without reference to the "judicial gloss" placed thereon. Reference to that "judicial gloss," as pointed out above, would have led the reasonable person to conclude that that statute does not prohibit

Parnigoni's conduct. His convictions must, therefore, be reversed.[5]

II. THE INDECENT EXPOSURE STATUTE UNDER WHICH MR. PARNIGONI WAS CHARGED AND CONVICTED IS OVERLY BROAD AND, THEREFORE, DEPRIVED MR. PARNIGONI OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

In addition to the infirmities discussed in Section I, *supra*, the D.C. statute governing indecent exposure is overly broad, prohibiting conduct that is constitutionally protected and is, therefore, violative of the due process clauses of the Fifth and Fourteenth Amendments. "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained." *Winters*, 333 U.S. at 520 (citing *Herndon v. Lowry*, 301 U.S. 242, 259 (1937)). "When a statute prohibits conduct a person has no right to engage in and conduct a person has a right to engage in, the statute is unconstitutionally overbroad." *State v. Beine*, 162 S.W.3d 483, 486 (Mo. 2005) (*en banc*) (citations omitted).

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[5] Even if the fair notice/void-for-vagueness doctrine did not require reversal here, the rule of lenity would. For the reasons discussed above, the indecent exposure statute is – even when viewed in light of the "judicial gloss" to which the Court of Appeals referred – ambiguous. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, ___ U.S. ___, 128 S. Ct. 2020, 2025 (2008) (citations omitted).

Parnigoni argued in the D.C. Court of Appeals that the indecent exposure statute was overly broad in that it would potentially criminalize conduct that is legal, such as the exposure of genitalia that frequently occurs in school locker rooms, in the shower rooms of public pools and athletic facilities, and in public restrooms. The Court of Appeals "decline[d] to address those situations on a factual record that does nothing to enlighten us in that regard." *Parnigoni*, 933 A.2d at 827 n. 5 (citing *Leiss v. United States*, 364 A.2d 803, 807 (D.C. 1976), *cert. denied*, 430 U.S. 970 (1977)). "'It is a well-settled principle *that one to whose conduct a statute clearly applies* is not entitled to attack it on the ground that its language might be less likely to give fair warning in some other situation not before the court.'" *Id.* (quoting *Leiss*, 364 A.2d at 807) (emphasis added).

As discussed in Section III, *infra*, the Court of Appeals erred in declining to consider this argument. Moreover, the "well-settled principle" had no application here because – contrary to the Court of Appeals' finding – Parnigoni's conduct was not conduct to which the indecent exposure statute "clearly applies," for the reasons discussed in Section I, *supra*. Third, in a factual setting very similar to that presented here, the Missouri Supreme Court, sitting *en banc*, ruled in *Beine* that a similar indecent exposure statute violated the due process clause because of its overbreadth.

Beine, like Parnigoni, was employed as a counselor at an elementary school. *Beine*, 162 S.W.3d at 484. One of his duties "was to prevent disruptive behavior by students in the school's halls

and restrooms. To perform this duty, Mr. Beine often had to enter the restrooms designated for males." *Id.* None of the restrooms in his school was expressly designated for students only, and adults sometimes used the public restrooms frequented by students. *Id.*

Beine was charged with four counts of indecent exposure. The factual basis for at least two of those charges arose when "Beine proceeded to use a urinal next to" two of the complainants in one of the school's restrooms. The boys, both under the age of fourteen, claimed that Beine "stood 3 or 4 feet from the urinal and urinated into it in an arc." *Id.* The boys "claimed that they could see Mr. Beine's 'private part.'" *Id.*

Another charge arose from an incident when a boy was in the school's restroom while Beine was, again, using a urinal. As that boy was washing his hands, "a group of boys entered the restroom and began causing a ruckus." *Id.* The boy testified that Beine turned from the urinal with his pants unzipped and his penis exposed, and told the unruly boys to "shut up." Beine then quickly turned back, zipped up his pants and quelled the restroom unrest. *Id.*

Beine was charged with indecent exposure. The Missouri statute under which he was charged provided:

> A person commits the crime of sexual misconduct involving a child if the person:
>
> (1) Knowingly exposes the person's genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age.

Id. at 484 – 485.

Beine was convicted by a jury of all four counts. *Id.* at 485. On appeal, he challenged the validity of the state statute, arguing that it was "unconstitutional because it punishes innocent conduct, contains no requirement of criminal intent (*mens rea*), and does not advise a person in the position of appellant as to what he must do to avoid violation of the statute when his conduct is otherwise lawful." *Id.* at 486. The Missouri Supreme Court agreed with Beine:

> In essence, Mr. Beine contends that the statute is overbroad – it prohibits conduct to which a person is constitutionally entitled along with conduct that a person has no right to engage in. Mr. Beine is correct. A person necessarily must knowingly expose himself in a great many situations. One of those situations is when a man uses a public restroom. Even if a reasonable person might think that in some of these restroom situations a child is likely to suffer affront or alarm from witnessing such exposure, that

> alone cannot make the exposure criminal. If that were the case, no person would ever be able to use a public restroom without risking a criminal charge.

Id.

Continuing, the Missouri Supreme Court held:

> As such, the statute prohibits two types of conduct: some of which a person has no right to engage in and the other of which a person has a right to engage in. *When a statute prohibits conduct a person has no right to engage in and conduct a person has a right to engage in, the statute is unconstitutionally overbroad.*

Id. (emphasis added; citations omitted).

The State of Missouri "attempt[ed] to avoid this result by making two arguments. First, it [] argued that even if the statute is unconstitutionally overbroad, the court cannot strike down the statute because Mr. Beine was engaging in conduct that was not constitutionally protected." *Id.* at 487. The Missouri Supreme Court rejected this argument, however, holding that "[t]his argument fails under the *doctrine of overbreadth. Under that doctrine, a person may contest the constitutionality of a statue even if he was not engaging in constitutionally protected conduct.*" *Id.* (emphasis added).

The State in *Beine* also argued that "the overbreadth doctrine should not apply to this case

because this is not a [F]irst [A]mendment case." *Id.* Again, the court rejected the State's argument. While acknowledging that the overbreadth doctrine is rarely applied "when a case involves a non-speech related constitutional attack," the court noted that "the overbreadth doctrine [has been found] applicable to non-[F]irst [A]mendment cases in the past." *Id.*

> For example, this Court extended the overbreadth doctrine to strike down a loitering ordinance in *City of St. Louis v. Burton*, 478 S.W.2d 320, 323 (Mo. 1972), despite the fact that no [F]irst [A]mendment claims were made. The court of appeals relied on *Burton* to extend the overbreadth doctrine and strike down a solicitation ordinance in *Christian v. Kansas City*, 710 S.W.2d 11, 12 – 14 (Mo. App. 1986), even when the appellant made no [F]irst [A]mendment arguments.

Id.

"The purpose of the overbreadth doctrine is to ensure that a statute does not punish innocent conduct," noted the court in *Beine*. *Id.* "Like the solicitation ordinance in *Christian*, the statute in this case 'reaches beyond conduct which is calculated to harm and could be used to punish conduct which is essentially innocent,' so it is overbroad." *Id.* (quoting *Christian*, 710 S.W.2d at 13).

So it is in the present case. As Parnigoni argued below, D.C.'s indecent exposure statute, even taking into account prior "judicial gloss," would

criminalize innocent conduct, such as adult men changing and showering at a public pool locker room if boys under the age of sixteen were present. Indeed, it is the *Parnigoni* decision itself that clearly establishes that this overly broad result is now the law in D.C., grafting, as it did, the children-cannot-consent provisions of Chapter 30 of the D.C. Code into the indecent exposure statute found in Chapter 13 (*see* Section I, *supra*, at pp. 9 – 11). That is, if a fifteen-year old boy saw a man's penis in the pool locker room or in the men's restroom at the Verizon Center, the boy could not consent to that exposure and the man would be subject to prosecution under the *Parnigoni* gloss on the indecent exposure statute.

Parnigoni's challenge, then, was not idle when he raised it below, and it is critically alive now in light of the Court of Appeals' misconstruction in this case. Even if it were not overly broad before the *Parnigoni* decision, it clearly is now, both as applied to Parnigoni and to others. D.C.'s indecent exposure statute should, therefore, be stricken under the due process provisions of the Fifth and Fourteenth Amendments, both because – on its face and as interpreted by the D.C. Court of Appeals – it is void-for-vagueness; and because it is overly broad. Parnigoni's convictions must, consequently, be reversed.

III. THE COURT OF APPEALS VIOLATED MR. PARNIGONI'S RIGHT TO DUE PROCESS BY IMPROPERLY CURTAILING THE PARAMETERS OF HIS CHALLENGE TO THE INDECENT EXPOSURE STATUTE.

Parnigoni argued below that D.C.'s indecent exposure statute was void-for-vagueness and overly broad in that, pursuant to the court's earlier interpretations, it would criminalize protected conduct, such as genital exposures occurring in the locker rooms of schools, swimming pools, athletic facilities and the typical men's restroom. The court declined to even consider those arguments. Rather, it responded:

> We note that Parnigoni also poses hypothetical conduct that might be outlawed by our current interpretation of the Indecent Exposure statute, including nudity in school locker rooms, in public pools and in athletic facilities. We decline to address those situations on a factual record that does nothing to enlighten us in that regard. *See Leiss, supra,* 364 A.2d at 807 ("It is a well-settled principle that one to whose conduct a statute *clearly applies* is not entitled to attack it on the ground that its language might be less likely to give fair warning in some other situation not before the court.")

Parnigoni, 933 A.2d at 827 n.5 (emphasis added).

The court's refusal to entertain Parnigoni's argument on this point was erroneous for at least three reasons, and thereby deprived Parnigoni of his right of due process. First, it was erroneous because it was based upon an erroneous supposition: that Parnigoni was "one to whose conduct [the indecent exposure] statute clearly applies." For the reasons discussed in Section I, *supra*, given the private nature of his conduct, the consent of O.J. to the conduct, and the accidental nature of the exposure *vis-à-vis* O.J.'s father, J.J., the application of this statute to Parnigoni's conduct was anything but clear.

Second, the court's refusal to address this aspect of Parnigoni's argument was erroneous because it was contrary to the court's own precedent. In *Garcia*, 335 A.2d at 223, the D.C. Court of Appeals held that "[e]ven though the statute may be neither vague, overbroad [n]or otherwise invalid as applied to the conduct charged against appellees, the appellees are permitted to question its unconstitutional vagueness or overbreadth if it is susceptible of application to the protected expression of others." (citing *Gooding v. Wilson*, 405 U.S. 518, 520 (1972)). *Garcia* involved a challenge to the predecessor of same statute as that at issue here, albeit to the clause that prohibited the making of a "lewd, obscene and indecent sexual proposal," on grounds that the statute "was unconstitutionally vague and overbroad." *Id.* at 219.

Third, as noted in Section II, *supra*, even if the concern raised by Parnigoni was "hypothetical" before the Court of Appeals decided his case, it

certainly is no longer. By engrafting the children-cannot-consent provisions of the Anti-Sexual Abuse provisions of the D.C. Code, found in Chapter 30, into the indecent exposure statute that is part of Chapter 13 – even though that consent statute is, by its own terms, applicable only to specified crimes that do *not* include indecent exposure (*see* pp. 9 – 11, *supra*) – the *Parnigoni* decision turns indecent exposure into a strict liability crime, at least when someone under the age of sixteen sees someone's genitals. That drastic expansion of the indecent exposure statute, never before recognized, applied not only to Parnigoni, but also to those over whom the net is now cast by the Court of Appeals' decision in this case.

For these reasons, the Court of Appeals deprived Parnigoni of due process by refusing to consider the application of the indecent exposure statute to the "hypotheticals" he raised. What may have been mere hypotheticals prior to the court's decision in this case are squarely in the cross-hairs now that the Court of Appeals, in its decision in this case, turned D.C.'s indecent exposure statute, as it applies to exposures to people below the age of sixteen, into a strict liability regime.

CONCLUSION

Petitioner David Parnigoni respectfully submits that the questions presented herein merit consideration by this Court. Petitioner David Parnigoni respectfully requests, therefore, that a Writ of Certiorari to the District of Columbia Court of Appeals be issued to review the decisions below.

Respectfully submitted,

/s/

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APPENDIX

Entered October 11, 2007

933 A.2d 823

Parnigoni v. District of Columbia
D.C., 2007.

District of Columbia Court of Appeals.
David PARNIGONI, Appellant,
v.
DISTRICT OF COLUMBIA, Appellee.
No. 04-CT-1378.

Argued June 20, 2006.
Decided Oct. 11, 2007.

Background: Defendant was convicted in the Superior Court, Erik P. Christian, J., of indecent exposure, and he appealed.

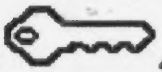
Holdings: The Court of Appeals, Kramer, J., held that:

(1) indecent exposure statute was not unconstitutionally vague; and

(2) defendant's conduct was sufficiently public to come within the indecent exposure statute, and thus, he was not exempted from statute on ground that his actions were conducted within a private home.

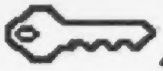
Affirmed.

West Headnotes

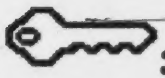
[1] Constitutional Law 92  **4506**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4506 k. Vagueness. Most Cited Cases

A criminal statute is void on vagueness grounds when it provides no standards by which conduct falling within its scope may be ascertained, and such a statute infringes upon due process rights by failing to provide fair warning of what is prohibited and inviting capricious and arbitrary enforcement by public officials. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92  **4509(20)**

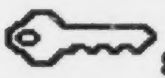
92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(20) k. Obscenity and Lewdness. Most Cited Cases

Obscenity 281  **3**

281 Obscenity

281k3 k. Indecent Exposure. Most Cited Cases

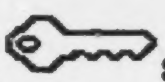
Indecent exposure statute was not unconstitutionally vague, given that cases had defined the contours of the statute's application beyond merely its wording. D.C. Official Code, 2001 Ed. § 22-1312.

[3] Obscenity 281  **8**

281 Obscenity

281k8 k. Defenses. Most Cited Cases

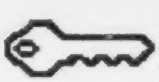
Victim could not have consented to game of naked ping pong because he was under the age of sixteen when the events took place, and such consent was barred by the indecent exposure statute. D.C. Official Code, 2001 Ed. § 22-1312.

[4] Obscenity 281  **8**

281 Obscenity

281k8 k. Defenses. Most Cited Cases

The penalty structure of the indecent exposure statute refutes the idea that the consent of a child under the age of sixteen can provide a valid defense. D.C. Official Code, 2001 Ed. § 22-1312.

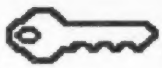
[5] Criminal Law 110  **1144.13(3)**

110 Criminal Law

110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution. Most Cited Cases

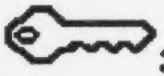
Criminal Law 110 1144.13(5)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(5) k. Inferences or Deductions from Evidence. Most Cited Cases

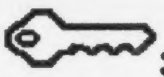
Criminal Law 110  1159.4(2)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.4 Credibility of Witnesses
110k1159.4(2) k. Province of Jury or Trial Court. Most Cited Cases
In reviewing challenges to the sufficiency of the evidence, appellate courts view the evidence in the

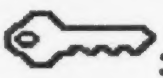
light most favorable to the government, giving it the benefit of all reasonable inferences, and defer to the jury with respect to credibility determinations and the weighing of the evidence, and it is only where the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt that appellate court can reverse a conviction.

[6] Obscenity 281  **3**

281 Obscenity
281k3 k. Indecent Exposure. Most Cited Cases
The law pertaining to indecent exposure does not require that an accused have a specific intent to expose himself to any particular person; it is sufficient that accused generally intended to expose himself so as to draw attention to his exposed condition. D.C. Official Code, 2001 Ed. § 22-1312.

[7] Obscenity 281  **3**

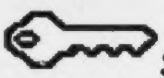
281 Obscenity
281k3 k. Indecent Exposure. Most Cited Cases
Indecent exposure statute requires exposure at such a time and place where as a reasonable man he knows or should know his act will be open to the observation of others. D.C. Official Code, 2001 Ed. § 22-1312.

[8] Obscenity 281  **3**

281 Obscenity

281k3 k. Indecent Exposure. Most Cited Cases

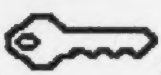
Defendant's conduct was sufficiently public to come within the indecent exposure statute, and thus, he was not exempted from statute on ground that his actions were conducted within a private home; defendant was in basement of private home when he exposed himself and appeared surprised when he saw another individual walk into the basement, defendant was in an open part of home where people gathered to play games and door to basement was not closed or locked, and reasonable man should have known his act would be open to the observation of others. D.C. Official Code, 2001 Ed. § 22-1312.

[9] Obscenity 281  **3**

281 Obscenity

281k3 k. Indecent Exposure. Most Cited Cases

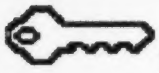
Law extends to indecent exposure committed both in a public setting and a private one. D.C. Official Code, 2001 Ed. § 22-1312.

[10] Obscenity 281  **3**

281 Obscenity

281k3 k. Indecent Exposure. Most Cited Cases

It is the indecent exposure of the comparable portions of the male and female anatomy that constitutes the crime of indecent exposure; in other words, the indecent exposure of human genitalia is the offense. D.C. Official Code, 2001 Ed. § 22-1312.

[11] Obscenity 281  **17**

281 Obscenity
281k14 Evidence
281k17 k. Weight and Sufficiency. Most Cited Cases
Jury could have reasonably found that defendant exposed his genitalia to another individual, and thus, evidence was sufficient to support defendant's conviction for indecent exposure; individual testified that defendant was facing him "completely naked," and that defendant "covered his genitals" after he realized individual was in the basement of home. D.C. Official Code, 2001 Ed. § 22-1312(a).

***824** David Schertler, Washington, DC, for appellant.
Janice Y. Sheppard, Assistant Attorney General, with whom Robert J. Spagnoletti, Attorney General for the District of Columbia at the time the brief was filed, Edward E. Schwab, Deputy Attorney General, and Rosalyn Calbert Groce, Assistant Attorney General, were on the brief for appellee.

Before GLICKMAN, KRAMER and FISHER, Associate Judges.

***825** KRAMER, Associate Judge:
The appellant, David Parnigoni, challenges his convictions for two counts of indecent exposure, arguing that they should be overturned because the language of the statute under which he was convicted is unconstitutionally vague. He asserts that the conviction involving a young boy, O.J.,

eleven years old at the time of the events at issue, should be overturned on the additional grounds that the conduct was private, consensual and, according to Parnigoni, therefore not prohibited under the law. He further argues that the other conviction involving O.J.'s father, J.J., should be overturned because the evidence was insufficient to show that J.J. viewed his exposed genitalia, as the law requires, or if so, that the exposure was intentional. We affirm the convictions.

I

The factual background of this matter is as follows: Parnigoni had worked at Janney Elementary School, where he befriended O.J. and his family.[FN1] Over the course of several years,[FN2] Parnigoni spent considerable time with O.J., and the family grew to trust him, treating him as a family member and giving him keys to their home.

> FN1. The family included O.J., his mother, his father (J.J.) and two younger sisters.
>
> FN2. The testimony at trial was that Parnigoni had known the family for "three or four" years at the time of the incident.

On the day of the events at issue here, the then-thirty-three-year-old Parnigoni spent the day with the then eleven-year-old O.J. That afternoon, the two were alone in O.J.'s home when Parnigoni suggested that they play a game of ping-pong. O.J. agreed, and they went into the basement where there was a ping-pong table. Parnigoni suggested an

additional rule for this particular game of ping-pong: that whoever lost a game would have to play the next game naked. O.J. agreed to play according to that rule and proceeded to beat Parnigoni at the first game they played. Parnigoni then took off all of his clothes and began to play the next match naked. O.J. testified that he was able to see Parnigoni's "whole body except for his legs down," including his "private parts."

At about 2:45 p.m., while Parnigoni and O.J. were still in the basement playing their second game of ping-pong, O.J.'s father, J.J., returned home. J.J. was running late for a dentist appointment and was stopping at home to pick up his son to take him to the appointment as well. While J.J. was still outside, walking to the front door, he heard the sound of ping-pong being played from the basement window wells. He then walked through the house, down the stairway to the basement and had almost reached the bottom when he observed Parnigoni facing him, completely naked.[FN3] Once Parnigoni noticed that J.J. had come down the steps into the basement, he acted surprised, covered his genitals and ran to a nearby bathroom which was five to six feet from the ping-pong table.

> FN3. J.J. testified that he was fifteen to twenty feet away from the ping-pong table when he first observed Parnigoni.

Parnigoni was subsequently arrested and charged with two counts of indecent exposure, one as to J.J. and one as to O.J. At the conclusion of a jury trial, he was found guilty of both offenses.[FN4]

FN4. Parnigoni was sentenced to one year of imprisonment for the count as to O.J., with the execution of the sentence suspended but for six months, and ninety days of imprisonment for the count as to J.J., with the execution of the sentence suspended. The two sentences were imposed consecutive to each other. He was also sentenced to five years of probation on each count, to run concurrently with each other.

***826 II**

A.

[1] We first address Parnigoni's argument that his convictions for indecent exposure should be vacated because the statute under which he was charged is unconstitutionally vague:

A criminal statute is void on vagueness grounds when it provides no standards by which conduct falling within its scope may be ascertained. Such a statute infringes upon due process rights by failing to provide fair warning of what is prohibited and inviting capricious and arbitrary enforcement by public officials.

Leiss v. United States, 364 A.2d 803, 806 (D.C.1976); *see also Parker v. Levy*, 417 U.S. 733, 752, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (quoting *Smith v. Goguen*, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) ("The doctrine [of void for vagueness] incorporates notions of fair notice or

warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' ")). When addressing the vagueness doctrine, the Supreme Court has said that "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute." *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), *quoted in McNeely v. United States*, 874 A.2d 371, 382 n. 14 (D.C.2005). As we set out below, the indecent exposure statute addressed here has had a number of judicial glosses that have clarified its meaning, at least in the context of the facts of this case.

[2] The provision utilized to charge Parnigoni's actions with respect to O.J., reads in its entirety:

Any person or persons who shall commit an offense described in subsection (a) of this section, *knowing he or she or they are in the presence of a child under the age of 16 years,* shall be punished by imprisonment of not more than 1 year, or fined in an amount not to exceed $1,000, or both, for each and every such offense.

D.C.Code § 22-1312(b) (2001) (emphasis added). Because of the cross-reference, to understand subsection (b) it is necessary to refer to subsection (a) of section 22-1312. That provision, under which Parnigoni's actions with respect to J.J. were charged, makes it unlawful "for any person or persons to make any obscene or indecent exposure of his or her person." We addressed the meaning of this language

in *Duvallon v. District of Columbia*, 515 A.2d 724 (D.C.1986), and held that the language "obscene or indecent exposure of his or her person" makes "the indecent exposure of human genitalia [ ] the offense." 515 A.2d at 728. We have also held: "An exposure becomes indecent when the defendant exposes himself at such a time and place, where as a reasonable man he knows or should know his act will be open to the observation of others." *Peyton v. District of Columbia*, 100 A.2d 36, 37 (D.C.1953); *see also Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C.1962). We have further held that in order to be convicted of this offense, a defendant must have intended to do the prohibited act, though "the intent required is only a general one, and need not be directed toward any specific person or persons." *Peyton, supra*, 100 A.2d at 37. On the other hand, we have held that "[o]rdinary acts involving exposure as a result of carelessness or thoughtlessness, particularly when such acts take place within the privacy of one's home, do not in themselves establish the *827 offense of indecent exposure." *See Selph v. District of Columbia*, 188 A.2d 344, 345 (D.C.1963). Thus, Parnigoni's argument that the indecent exposure statute is unconstitutionally vague is refuted by a longstanding line of cases from this court that have clarified its meaning. For this reason, we reject Parnigoni's argument that the indecent exposure statute is unconstitutionally vague. The statutory construction in each of these cases, moreover, is considered part of the statute for purposes of assessing its vagueness. *Wainwright v. Stone*, 414 U.S. 21, 22, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973) (per curiam) ("The judgment of [ ] courts as to the

vagueness or not of a state statute must be made in the light of prior state constructions of the statute.") Because our cases have defined the contours of the statute's application beyond merely its wording, we reject Parnigoni's argument that the indecent exposure statute is unconstitutionally vague.[FN5]

> FN5. We note that Parnigoni also poses hypothetical conduct that might be outlawed by our current interpretation of the Indecent Exposure statute, including nudity in school locker rooms, in public pools and in athletic facilities. We decline to address those situations on a factual record that does nothing to enlighten us in that regard. *See Leiss, supra*, 364 A.2d at 807 ("It is a well-settled principle that one to whose conduct a statute clearly applies is not entitled to attack it on the ground that its language might be less likely to give fair warning in some other situation not before the court."(citing *Parker, supra*, 417 U.S. at 756, 94 S.Ct. 2547;) *Gooding v. Wilson*, 405 U.S. 518, 530, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972) (Burger, C.J., dissenting); *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)).

[3] Parnigoni also asserts that the indecent exposure statute was not intended to apply to an act committed in private in the presence of a single and consenting person. This is an accurate statement of our law. *See Rittenour v. District of Columbia*, 163 A.2d 558, 559 (D.C.1960); *District of Columbia v. Garcia*, 335 A.2d 217, 224 (D.C.1975). But the argument misses the point. O.J. cannot have

consented because he was under the age of sixteen when the events at issue took place; such consent is barred by the statute.

We had occasion to address the effect of a claim of consent by an eleven-year old minor-the same age as O.J.-to a sexual act in *Davis v. United States*, 873 A.2d 1101 (D.C.2005). There, a father was charged with misdemeanor sexual abuse under section 22-3006 of the District of Columbia Code,[FN6] and based his defense on consent under section 22-3007, which reads: "Consent by the victim is a defense, which the defendant must establish by a preponderance of the evidence to a prosecution under [section 22-3006]." We upheld "the longstanding rule that a child is legally incapable of consenting to sexual conduct with an adult,"873 A.2d at 1105, and noted that "the historical premise of that rule is that children cannot consent 'in a meaningful way,' because they 'do not understand what is happening to them.' " *Id.* (quoting *Williams v. United States*, 756 A.2d 380, 386 (D.C.2000), and *Guarro v. United States*, 99 U.S.App. D.C. 97, 100, 237 F.2d 578, 581 (1956)).

> FN6. The facts were that while father and daughter were watching television together, the father exposed his penis and asked his daughter to rub it.

Various provisions of the Anti-Sexual Abuse Act of 1994, *see*D.C.Code §§ 22-3001-3012 (2001), which substantially revised the sex offense laws in this jurisdiction, are also useful to address the issue of whether a child can consent to actions that would otherwise violate the indecent exposure statute.

Sections 22-3008 (First Degree Child Sexual Abuse), -3009 (Second Degree Child Sexual Abuse), and -3010 (Enticing a Child) of the District of Columbia***828** Code prohibit child sexual abuse. Section 3011 provides that "[n]either mistake of age nor consent is a defense to a prosecution" under these sections, and section 22-3001 defines a child as "a person who has not yet attained the age of 16 years," *id.* § 22-3001(3), and contains language similar to that of subsection (b) of § 22-1312.

Similarly, the District of Columbia Protection of Minors Act of 1982, *id.* §§ 22-3100-3104 (2001), prohibits sexual performances using minors and defines a minor as "any person under 16 years of age." *Id.* § 22-3101(2). This Act also does not permit consent as a defense to charges arising under it.[FN7] *Id.* § 22-3104.

> FN7. Indeed, it even outlaws *parental* consent "to the participation of a minor in a sexual performance." D.C.Code § 22-3102(1) (2001).

[4] Finally, the penalty structure of the indecent exposure statute itself refutes the idea that the consent of a child under the age of sixteen can provide a valid defense. The penalty for indecent exposure involving a child under the age of sixteen is punishable by imprisonment of up to a year and a fine of up to $1,000, while the same action involving an adult is punishable by imprisonment of up to ninety days and a fine of up to $300. This disparity in penalty underscores the seriousness with which Congress considered indecent exposure with respect to a child and refutes the idea that "consent" would

have trumped "the longstanding rule, reiterated throughout the District of Columbia Code, that a child is legally incapable of consenting to sexual conduct with an adult." *Davis, supra*, 873 A.2d at 1105. Thus, we conclude that Parnigoni's claim that O.J. consented to the game of naked ping pong, thus consenting to Parnigoni's indecent exposure, must fail.[FN8]

> FN8. Parnigoni urges us to rule that a showing that the conduct was offensive to someone is required in cases charging indecent exposure based on private conduct, and cites us to the case of *State v. J.O.*, 69 N.J. 574, 355 A.2d 195, 196 (1976), which held that "the proper standard[ ] for ascertaining whether a privately committed act is one of indecent exposure within the meaning of the criminal statute is whether under the circumstances, the conduct is offensive, or has the likelihood of being offensive, to the persons who are present."
>
> We decline to follow this suggestion, particularly in the context of this case, where the issue of who was offended involves a child under the age of sixteen.

B.

[5] Parnigoni also argues that his conviction of indecent exposure involving J.J., pursuant to subsection (a) of section 22-1312 of the District of Columbia Code (formerly codified at subsection 22-1112(a)), should be vacated because the evidence was

insufficient to show that Parnigoni (1) intended to expose himself to J.J., which he asserts is a necessary element of the crime; and (2) actually exposed his genitalia to him. In reviewing challenges to the sufficiency of the evidence, we view the evidence "in the light most favorable to the government, giving it the benefit of all reasonable inferences," and "defer to the jury with respect to credibility determinations and the weighing of the evidence." *Hartridge v. United States*, 896 A.2d 198, 221-22 (D.C.2006). " 'It is only where the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt that this court can reverse a conviction.' " *Id.* at 222 (quoting *In re M.I.W.*, 667 A.2d 573, 575 (D.C.1995)).

[6] With respect to Parnigoni's argument that his conviction should be reversed because he did not intend to expose himself to J.J., as *Peyton, supra*, 100 A.2d 36, makes clear, the law pertaining to indecent*829 exposure does not require that an accused have a specific intent to expose himself to any particular person. It is sufficient that Parnigoni generally intended to expose himself so as to "draw[ ] attention to his exposed condition," *id.* at 37, and the record supports this finding. Moreover, the evidence showed that Parnigoni suggested the rule that whoever lost a game would have to play the next game naked. Thereafter, upon losing, Parnigoni voluntarily removed all of his clothing and proceeded to play ping-pong completely naked in front of an eleven-year-old boy, an act that was clearly intended to draw attention to his exposed condition. Thus there is no question from Parnigoni's conduct that he

intended to expose himself in an unlawful manner, and it is thus immaterial whether or not he intended to expose himself to J.J.

[7] There is, however, some question as to whether or not Parnigoni's conduct was sufficiently public as to be prohibited by the indecent exposure statute. Parnigoni was in the basement of a private home when he exposed himself and appeared surprised when he saw J.J. walk into the basement, arguably indicating that Parnigoni intended his behavior to be private and not to be observed by anyone other than O.J., which he contends would not be prohibited by the statute. *See Selph, supra*, 188 A.2d at 345 ("Nudity is not *per se* 'obscene.' It is not illegal for a man to be completely unclothed in his room."). The law in this jurisdiction, however, is not subjective; it requires exposure "at such a time and place where as *a reasonable man* he knows *or should know* his act will be open to the observation of others." *Id.* (emphasis added).

[8][9] In this case, a reasonable man should have known his act would be "open to the observation of others." *Id.* Parnigoni was in another family's home to which several people had access. Moreover, he was in an open part of the home where people gathered to play games and the door to the basement was not closed or locked. Furthermore, he is not protected merely by the fact that he was in a private household. Our law extends to indecent exposure committed both in a public setting and a private one. *Rittenour v. District of Columbia, supra*, 163 A.2d at 559 (D.C.1960) ("[I]n the present law, Congress deleted the requirement that [indecent exposure] be

committed in public and, in fact, expressly indicated that the statute covered acts occurring anywhere in the District."(internal quotation marks omitted)). We hold that, given these facts, a reasonable person should have known his or her act would be open to the observation of others. Parnigoni, therefore, is not exempted from the statute because his actions were conducted within a private home because his conduct was sufficiently public to come within the statute.

[10] Parnigoni's second argument for the insufficiency of the evidence as to J.J. is that the record does not establish that J.J. observed his genitalia, and that he therefore cannot have been found to have violated section 22-1312(a). As we noted above, it is "the indecent exposure of the comparable portions of the male and female anatomy that constitutes the crime. In other words, the indecent exposure of human genitalia is the offense." *Duvallon v. District of Columbia, supra,* 515 A.2d at 728. In *Duvallon* we concluded that the appellant's exposure of her buttocks and the side of her breast was insufficient exposure to sustain a conviction under section 22-1312. *Id.* at 728.

[11] Unlike *Duvallon,* however, there is ample evidence in this case for the jury to have found that Parnigoni exposed his genitals. J.J. testified that Parnigoni was ***830** facing him "completely naked," and that Parnigoni "covered his genitals" after he realized J.J. was in the basement. O.J. also testified that he saw Parnigoni's "whole body except for his legs down," including Parnigoni's "private parts," while they were playing ping-pong. Viewing this evidence "in the light most favorable to the

government, giving it the benefit of all reasonable inferences,"*Hartridge, supra*, 896 A.2d at 221-222, we conclude that the jury could have reasonably found that Parnigoni exposed his genitalia to J.J. We therefore hold that the evidence is sufficient to support Parnigoni's conviction for indecent exposure as to J.J. pursuant to section 22-1312(a).[FN9]

> FN9. While a viable merger issue may have existed as to whether Parnigoni was properly convicted under *both* § 22-1312(a) and (b) when he arguably committed only one criminal act and where § 22-1312(b) appears to be a sentence enhancement rather than a separately punishable offense in addition to § 22-1312(a), he has not raised it in the trial court or on appeal, and so it is not appropriately before us for consideration.

Accordingly, for the reasons stated herein, Parnigoni's convictions are hereby

Affirmed.

D.C., 2007.
Parnigoni v. District of Columbia
933 A.2d 823

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Entered June 23, 2008

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 04-CT-1378

DAVID PARNIGONI,
Appellant,

CDC2273-03

v.

DISTRICT OF COLUMBIA,
Appellee.

BEFORE: Washington, Chief Judge; Farrell, Ruiz, Reid, Glickman, Kramer, Fisher, Blackburne-Rigsby, and Thompson, Associate Judges.

ORDER

On consideration of appellant's decision petition for rehearing en banc, and the opposition thereto; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc be denied.

PER CURIAM

Copies to:

Honorable Erik P. Christian

David Schertler, Esquire
Schertler & Onorato, L.L.P.
601 Pennsylvania Avenue, N.W.
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Washington, DC 20004

Todd Kim
D.C. Solicitor General

THE COURT: All right. I'll hear your motion, if any, for judgment of acquittal.

MR. BORAKS: Well, it's, it's the same issue really, we've been discussing it all day. This is the first this really come up in the way that I think is unavoidable. Which is, is there any kind of sexual component to this charge?

And if so, is there any evidence from which a juror could find that that element has been proved beyond a reasonable doubt?

And if I may, Your Honor, I'm gonna tell the Court, as I have done in the annotation to my proposed instruction, what the basis is for my argument that there is a sexual component to this charge.

If Your Honor has my proposed instruction, there is an instruction number one on intent and then an annotation to that which sets forth the law that I think is persuasive on this issue.

THE COURT: Yes, I have it.

MR. BORAKS: Okay. Let, let me, let me start with the statute which is Section 1312 which is entitled Lewd, Indecent or Obscene Acts.

Now the predecessor of this statute was Section 1112, and, and that statute, which is really

THE COURT: You may be seated.

MR. BORAKS: -- identical in all important respects to the statute that's now 1312, was examined by the District of Columbia Court of Appeals in two cases.

One, District of Columbia versus Walter and the other, District of Columbia versus Garcia.

And that the court in each of those cases examined the legislative history of Section, then Section 1112, and found that in enacting it, and I'm quoting from both of those decisions, "Congress was deeply concerned about what it termed sex offenses within the District of Columbia."

And in Garcia, further quoting, "Sodomy, indecent exposure and indecent sexual acts with children are offenses which focus on the nature of the sexual act or overture itself proscribing sexual conduct on the outer reaches of immorality which is both unnatural and perverted."

Now the, the notion that you can prove a crime including the, the requisite mens rea by calling it general intent and saying all you have to show is that somebody exposed their genitalia to another is, it just cannot withstand scrutiny.

Or else, you know, back in the day when I cared about my boyish figure and I went to the Y on a regular basis, they have to lock up the whole place including, you know, underage kids that were there in the locker room all the time.

It, it can't just be that. There has to be something more to it than that. And the something more to it has to be an element that makes it sexual in nature.

Now last week, what I would like to say to the court is, if there is no element, if there is no sexual component to the statute, then there is, that raises a problem of what I would say is constitutional proportions.

Because how is it that the legislature can constitutionally create a classification of sex offender that requires registration as a sex offender for the commission of a crime that does not have as one of its elements any kind of sexual contacts, which is what would be the case if there were no sexual contacts to this, to this charge.

THE COURT: Well, look at the facts that Judge

Newman commented.
MR. BORAKS: I'm sorry?
THE COURT: Look at the facts in I believe is Duvallon versus District of Columbia, Volume 515.
MR. BORAKS: Yes, Your Honor.
THE COURT: A. Second 724 D.C. Court of

Appeals case in 1986, in which I think, it was Judge
Newman's opinion discussing defendant's exposure
underneath a, a cardboard protest sign in front of the
plaza of the Supreme Court of the United States.
Apparently the defendant approached that plaza
wearing a cardboard protest sign without clothing
underneath. The arresting officer testified that all
that they could see was defendant's buttocks and sides
of breasts.
And Judge Newman's decision found that
defendant's public exposure of the bare buttocks was not
indecent exposure of a human geni --
MR. BORAKS: Your Honor, I'm familiar with the
case.
THE COURT: Human genitalia.
MR. BORAKS: But, but --
THE COURT: And of course Chief Judge Pryor in
his dissenting opinion believed that it should have been
more vague and would have found otherwise

under the
circumstances in this particular case of Duvallon.
MR. BORAKS: Right. But, but the issue in that
case, and they have skirted around the question of what
is indecent and obscene. But the issue really went off
on what is exposure, you know, what is it that one must
expose under the statute.

THE COURT: It sounds like Judge Newman was
focusing on exposure. And the reason that he found that
there was no exposure was because this individual's
genitalia was hidden by the cardboard protest sign.
MR. BORAKS: Right.
THE COURT: So he, I believe he's focusing
directly on exposure.
MR. BORAKS: Absolutely.
THE COURT: And Judge, Chief Judge Pryor at the
time believed that even that which were revealed
constitute a violation under the statute, i.e. the, I
believe the sides of the breasts and the defendant's
buttocks.
MR. BORAKS: Absolutely. The argument in that
case between the, the points of view was whether or not
an exposure on the sides of breasts and the sides

of
buttocks is an exposure within the meaning of the
statute.
Since the court found it's not an exposure
because exposure has to be of genitalia, it was really
not necessary to decide the question of whether it was
indecent or obscene exposure.
THE COURT: What do we
MR. BORAKS: It wasn't an exposure.
THE COURT: What do we have in the instant

case?
MR. BORAKS: I'm sorry, Your Honor, I lost the
last --
THE COURT: What do -- I'm sorry, what do we
have in our case here? Because I didn't hear any
testimony or any controverted testimony that there was
any type of --
MR. BORAKS: This is --
THE COURT: -- covering.
MR. BORAKS: No, the issue in this case is
different. The, the, the, what they were worried about
in Duvallon is, wasn't an exposure. That's not what I'm
asking the Court to concern itself with in this case.
There was an exposure.
THE COURT: Yes.

MR. BORAKS: The question is was it an obscene and indecent exposure and what is required beyond exposure in order for an exposure to be obscene and indecent. Or is exposure in and of itself necessarily obscene and indecent.

So that's what I'm asking the Court to address. If there's something else other than mere nudity of certain parts of the body, I just don't see how that could be.

I don't see how that could be the meaning of the statute. I don't see how that fits the context that the Court has examined as being obviously what the statute is about.

THE COURT: Ms. Featherstone.

MS. FEATHERSTONE: Yes, Your Honor. Your Honor, at this juncture the Government must show that more likely than not, that the offenses occurred.

And the testimony of both Mr. Jakubos and Oliver have clearly established the defendant was exposed and his genitalia were exposed.

Additionally, the Court of Appeals has held in Payton that the indecent portion of the statute goes to where a reasonable man knows or should know

that his act
is likely to be seen by others.
This took place in a home that was not the defendant's. It took place where other children live, a
wife, a father and Oliver lived. In this particular case, the statute is clear, its obscene or indecent.
And in this case the defendant was indecently exposed. He was exposed because his entire body was
uncovered. He was completely naked. He was in the
presence of a child under the age of 16.
He was also in the presence of an adult and he did it in a place, in the time that his action is likely
to be seen. He knew that it sho, it could have been

seen by someone. So the Government --
THE COURT: Pursuant to how the Court describes
indecent under Payton, is that right?
MS. FEATHERSTONE: Yes, Your Honor. In Payton,
the Court, the Court states that an exposure becomes
indecent when the defendant exposes himself at such a
time and place where the reasonable man knows or should
know his act could be open to the observation of others.
THE COURT: Mr. Boraks.
MR. BORAKS: Your Honor, it just can't be that.

Otherwise, what if the two of them had gone to the Y together and gotten undressed in front of each other.

It just, it just can't just be that.

Payton, and it was a 50-year-old case. It doesn't deal with the issue of instructions to a jury.

And yes, it does say what he says.

But, you know, Payton is also a case that involved exposure in a public place, you know, outside.

I mean the guy is sitting in a car outside. It's a, it's a different context.

Maybe there is an element of indecency that, that, that can be shown simply by exposing yourself in public or in a public place. But

THE COURT: Chief Judge Pryor's last sentence in the Duvallon opinion, his dissenting opinion, specifically stated under these circumstances. And I think that's what we're quarreling with here, what constitutes indecent exposure under the circumstances.

And I'm not sure, it doesn't appear Payton has been overruled or commented on different way. And that's the second element of these offenses that your client has been charged with.

That the defendant exposed himself at such a time and place where a reasonable person knows

or should
have known that his act would be open to the observation
of others.
And, you know, you can distinguish between your
locker room scenario and what we have in the instant
case or other circumstances such as this protester in
Duvallon.
And perhaps the facts, the facts in Hurley,
although that court, Hurley versus District of Columbia,
although that court talks about a jury pool itself.
MR. BORAKS: The Court talks about what, Your
Honor?
THE COURT: The composition of the jury pool,
something completely different.
MR. BORAKS: That's what that case was about.
THE COURT: Right, right. But this Court is
finding, viewed in the light most favorable to the

Government at this, at this juncture, one could conclude
beyond reasonable doubt that your client committed these
offenses.
I'll hear further if you wish to present a
defense at the conclusion of the defense's case.
MR. BORAKS: Right.
THE COURT: So your motion for judgment of

acquittal is denied at this time.
MR. BORAKS: Your Honor, we're not gonna hear
from Officer Palachek I take it.
THE COURT: I believe that officer was gonna
testify only towards the age of your client which is
stipulated to.
MR. BORAKS: So the government intends now to
rest.
THE COURT: Right. With the admission of
Government's Exhibit Number one, which is a diagram of
the basement at 1921 Sheppard Street, Northwest.
MR. BORAKS: Could I request a few minutes to
consult with my client as to what we want to do in terms
--
THE COURT: Absolutely, absolutely. And what I
wish to do after you had that consultation is conduct
the Boyd colloquy, basically asking him what his
decision is, whether he wishes to testify or not.